FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 16 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

JOHN P. OHL,
CHARLES C. PARLIN,
JOHN W. FROST,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
I.	1
A. Section 101 Deals Only With "Sales or Exchanges"	1
B. Analogy to "Sales or Exchanges" Insufficient	5
II.	10
A. Sections 101 and 115 are Mutually Exclusive	10
B. The Court Below Has Ignored the Second Sentence of Section 115(c)	15
C. Cross-Reference in Section 115(c) to Sections 111 and 112 Adequate	16
D. Doubt to Be Resolved in Favor of Petitioners	16
E. Decision Below Leads to Absurd Consequences	16
III.	17
A. No References to Losses	17
B. Congressional Disapproval of Regulations by Changes in 1928 Act	18
IV. Respondent's Analysis of the Legislative History of Section 115(c) and Section 101 Is Inaccurate	19
V. Reference to the Committee's Reports Is Inappropriate	24
A. Committee Reports Under 1924 Bill	25
B. Section 23(k)(2) of Revenue Act of 1938	28
C. Changes Made in 1934 and Later Acts in Relationship of Former Section 101	29
D. 1934 Amendment to Sections 115(c) and 117	30
E. Committee Reports Relating to 1934 Bill	31
VI. In Number 97 the Refund Claim is Valid for the Full Amount	34
Conclusion	38

Citations.

Cases: PAGE

American Tobacco Co. v. *Werchmeister*, 207 U. S. 284, 293 24

Blair v. *Birkenstock*, 271 U. S. 348 35
Burnet v. *Harmel*, 287 U. S. 103 ..... 17, 23

Childs v. *Commissioner*, 35 B. T. A. 1125 9

Dahlinger v. *Commissioner*, 51 F. (2d) 662, 663 (C. C. A. 3rd) 23

Echols v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th) 22

Gates v. *Commissioner*, 9 B. T. A. 1133 8
Goodyear Tire and Rubber Co. v. *United States*, 273 U. S. 100 7

Hellmich v. *Hellman*, 276 U. S. 233 6
Helvering v. *Bliss*, 293 U. S. 144 ..... 3, 15, 19

Langstaff v. *Lucas*, 9 F. (2d) 691 (W. D. Ky.) aff'd. 13 F. (2d) 1022 (C. C. A. 6th) 5
Lynch v. *Hornby*, 247 U. S. 339, 341 22
Lynch v. *Turrish*, 247 U. S. 221, 226 22

Norfolk & West. Ry. Co. v. *Sims*, 191 U. S. 441, 447 23

Old Colony R. Co. v. *Commissioner*, 284 U. S. 552, 561 23

Penn Mutual Life Insurance Company v. *Lederer*, 252 U. S. 523, 537-538 32
Piper v. *Wilcutts*, 64 F. (2d) 813, 815-816 (C. C. A. 8th) 28
Preston V. Keene, 39 U. S. [14 Peters] 133, 137 23

CASES: PAGE

Rands v. *Commissioner*, 34 B. T. A. 1107 ..... 9, 18
Robinson v. *Commissioner*, 27 B. T. A. 1018, 1021 9

Schutz v. *Jordan*, 141 U. S. 213, 215 23

United States v. *Fairbanks*, 95 F. (2d) 794 8
United States v. *Merriam*, 263 U. S. 179, 187 23

Washington & Turner v. *Ogden*, 66 U. S. [1 Black.] 450, 456 23
Watson, John H., Jr. v. *Commissioner*, 27 B. T. A. 463 9
Weaver Co. v. *Commissioner*, 97 F. (2d) 31, 33 (C. C. A. 9th) 8
Werner, Henry P. v. *Commissioner*, 15 B. T. A. 482 9
Williamson, et al. v. *Berry*, 49 U. S. [8 Howard] 495, 543-544 23

STATUTES: PAGE

Revenue Act of 1924, section 201(c) 25
Revenue Act of 1924, section 203 25
Revenue Act of 1928, section 22(d) 11
Revenue Act of 1928, section 101 ..... 1, 10, 18, 19, 29
Revenue Act of 1928, section 111 ..... 15, 16
Revenue Act of 1928, section 112 ..... 13, 16
Revenue Act of 1928, section 115(c) 10, 15, 16, 19
Revenue Act of 1928, section 321 34
Revenue Act of 1928, section 322(a) 34
Revenue Act of 1934, section 115(c) 30
Revenue Act of 1934, section 117 29
Revenue Act of 1938, section 23(k)(2) 28

MISCELLANEOUS:

Griswold, (1935) 48 Harv. L. Rev. 1032, 1035 32
S. M. 1957, Cum. Bull. Sales Tax Rulings, Dec., 1920, p. 104 7
Regulations 45, Article 1548 8
House Report No. 350, 67th Cong., 1st Sess., pp. 10-11 24
House Report No. 2, 70th Congress, 1st Session, p. 12 12
Treasury Decision 2752, Vol. 20, Treasury Decisions Under Internal Revenue Laws of the United States, Jan.-Dec., 1918, pp. 481, 482 7
House Report No. 704, 73d Cong., 2d Sess., p. 30 31
Senate Report No. 558, 73rd Cong., 2d Sess., p. 37 31

In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., and WILLIAM I. FROTHINGHAM, as Executors of the Estate of Alexander M. White,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, Sole Surviving Executor of the Estate of William A. White,

Petitioner,

vs.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

POINT I.

A. Section 101 Deals Only With "Sales or Exchanges".

Standing alone section 101 of the Revenue Act of 1928 deals only with rates of tax and then only where there has been a "sale or exchange." Standing alone the literal

meaning of "sale or exchange" is not inclusive of the idea of liquidation. Although section 101 is replete with defined terms, "sale or exchange" has not been defined. Therefore, its literal meaning should prevail in the absence of some other compelling consideration.

Against this position, respondent's argument is in the nature of a confession and avoidance. Nothing is addressed unequivocally to the context of the section alone but rather to its interdependency with certain other sections. For example, respondent (Resp. Brief, p. 18) contends: "The statute makes it clear that sections 23 and 101 are interdependent" and (Resp. Brief, pp. 24-25) that "The taxpayers have failed to show that the loss is clearly allowed by section 23(e) *apart* from section 101", and that, in fact, the loss plainly is *limited* by section 101.

That there is an interrelation between sections 23 and 101 we have not denied. The nature of the relationship is the crux of the problem of construction but only because of respondent's necessity of finding some compelling consideration that avoids the effect of the literal meaning of section 101.

In reply to respondent's argument by way of "avoidance", based upon the nature of the interrelation of sections 23 and 101, we submit that nothing in section 101 curtails our right to *deduction* under 23, because 101 deals only with *computation of tax rates*. Respondent's position (Resp. Brief, pp. 21-22) is that "Section 101(b) *limits* 23(e) and that while 23(e) does determine *deductibility* section 101 limits the amount of the *deduction*." As to this we submit that reading 101 in a manner to limit *deductibility* under 23 for determining *net income* under section 21 is, in view of Mr. Justice Roberts' clearly stated analysis of

these sections in *Helvering* v. *Bliss*, 293 U. S. 144, so opposed to the decision of this Court that unless the case be overruled the respondent's construction cannot possibly prevail. There the Court stated (p. 147):

> "The scheme of all the Revenue Acts since that of 1916 has been to sweep all income of every sort, *including capital gains*, into what is denominated *gross income* and to authorize certain *deductions* therefrom in order to arrive at *net income*,—the *base for the calculation of the tax.*" [Italics added.]

The Court continued, after adverting to the reasons for the enactment of the 12½% rate in section 101 (p. 148):

> "The accomplishment of this purpose of applying two rates to *two different kinds of net income*, required new provisions *as to the base for each rate.* Section 101 of the Revenue Act of 1928 prescribes the method to be followed. * * * In the Act of 1928, as will be seen by reference to §§21, 22 and 23 (*supra*, note 4), *the statutory concept of net income is preserved.* These sections are found in Part II of Title I, which deals with '*Computation of Net Income.*' *Section 101, on the other hand*, is found under 'Supplemental Provisions', and is captioned 'Supplement A—*Rates of Tax*'. *It is obviously directed to the matter of computation of Tax on a portion of net income as defined in § 21* [which is 22 less 23]. There is nothing novel in such *a division* of the statutory net income into parts for the purpose of applying different *rates of tax* * * *." [Italics and matter in brackets added.]

Respondent is right—the sections are interdependent; but respondent's analysis of the nature of the relationship shows a flagrant disregard of this Court's construction of these sections 101 and 23 of the Revenue Act of 1928.

Such decision of this Court suffices to answer the mere quotation by respondent (Resp. Brief p. 18) from section 101 of those defined terms which make reference to section 23. Such definitions are limited, as this Court has held, to a taxation of a portion of the income at a special rate and do not at all constitute a generic limitation upon the computation of net income.

We submit that the proper analysis of the interrelation is as follows: You first determine net income under 21 by taking gross income in 22 (including capital gains) and deducting losses under 23. You then have net income. Nothing in 101 changes what you do so far. Now, you are ready to apply the *rate provisions* found in Part I and Supplement A. Section 101 is in Supplement A. The question becomes one of whether the 12½% rate applies. It does not apply to the portion of income segregated unless the income arises from "sales or exchanges". It is not a question, therefore, of *deductibility* from *net income* at all. Section 101 is not a limitation, as respondent claims, on *deductibility* under 23. The only question is one of *segregation* of net income already determined under 21 for the special 12½% rate *in Supplement A*.

An examination of respondent's entire brief will disclose that at no place therein is there any mention of the fact that the sections are in different Supplements and Parts of the Act. Sections from different Parts and Supplements of the Act are placed in physical proximity without noting this fact.* The framework of the Act has been

---

*See for example Resp. Brief, p. 7, where section 101(c) (2) from Part I, Supplement A, is immediately followed by a quotation from section 115 (c) from Part II, Supplement B, and at p. 18 where section 23 in Part II is followed by quotations from subdivisions in section 101 in Supplement A 2, Part I.

completely deleted by asterisks in the Appendix. Respondent's "avoidance" of the literal meaning of the section based upon his conception of the nature of the interrelation is premised upon an entire disregard of the framework of the Act.

B. Analogy to "Sales or Exchanges" Insufficient.

Respondent's reply to petitioners' Point I B does not refute petitioners' contention that an analogy to a "sale or exchange" is insufficient to bring a case within section 101. Now, a liquidation either is, or is not, *in fact* a sale or exchange. Respondent avoids an unequivocal position as to whether a liquidation is, or is not, *in fact* a sale or exchange.* Respondent attempts to create the impression that a liquidation is, in effect, or in fact, a sale or exchange principally by seizing upon a quotation from the opinion in *Langstaff* v. *Lucas*, 9 F. (2d) 691, where the court in contrasting an ordinary dividend with a liquidating dividend, happened to state that a liquidating dividend was, in effect, a purchase of all outstanding stock by the liquidating corporation. Based on this, respondent has stated as its conclusion (Resp. Brief, p. 9) that for tax purposes liquidations are in effect "sales or exchanges" of stock within the meaning of that phrase *"throughout the Revenue Acts and in section 101(c)(2)"*.

* See for example Resp. Brief, p. 4, where it is stated that a corporate liquidation *is* a sale or exchange within section 101 (c)(2) of the Revenue Act of 1928; compare the following sentence on p. 4 which states 115 (c) *requires* a determination that a corporate liquidation is a sale or exchange. Also compare p. 7 the statement that the decisions hold that a corporate liquidation shall be treated *as what they in effect are—sales;* and p. 9 where it is stated that for tax purposes liquidations are *in effect* sales or exchanges.

We submit, first, that the portion of the District Court's opinion in *Langstaff* v. *Lucas, supra* (decided prior to this Court's decision in *Hellmich* v. *Hellman*, 276 U. S. 233), relied upon by respondent, goes far beyond the careful statement later made by this Court upon the same question.* This Court's opinion in the later *Hellmich* v. *Hellman* case, *supra*, points out, in making the same comparison between ordinary and liquidating dividends, that the gain on a corporate liquidation was subject to the same tax burden under the rate provisions—the normal tax—in like manner as if the stockholder had sold his stock to a third party. This was due to the fact that sales and liquidations under the Revenue Act of 1918 fell under section 22, both being regarded as "other gains or profits" for the purpose of determining net income. There was only one set of rates applicable to all gains on all capital transactions under the 1918 Act and no special 12½% rate on capital gains as in later Acts. Obviously, a statement made under such circumstances is far different than a holding that a liquidation is *per se* a sale. It is simply a holding that a liquidation is analogous to a sale.

* The Circuit Court of Appeals for the Sixth Circuit affirmed the *Langstaff* case, *supra*, 13 F. (2d) 1072, upon the reasoning below. The opinion makes it clear that the only problem of construction was to bring the definition of "dividend" into harmony with the special treatment of liquidating distributions. The Sixth Circuit's opinion stated: "Although the half interest in the corporate assets which came to Langstaff was within the broad definition of '*dividend*' in section 201 (a) [comparable to 115 (a) of the 1928 Act] * * *, yet the transaction was the very one specifically provided for in the last sentence of section 201 (c) [comparable to 115 (c) of the 1928 Act], and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, *instead of a corporate dividend*. Only so can the sections [meaning (a) and (c)] be effectively read together." [Italics and matter in brackets added.] There was no section comparable to 101 of the 1928 Act even in the Act under consideration.

We submit, second, that neither *Langstaff* v. *Lucas, supra,* nor *Hellmich* v. *Hellman, supra,* could have possibly established that a liquidation is to be treated as a sale as claimed by respondent "under section 101(c)(2)" because both cases involve the Revenue Act of 1918, and that Act had no provision comparable to section 101(c)(2) at all.

We submit, third, that such cases do not hold that a liquidation is a sale "throughout the revenue acts" as contended by respondent. For example, under Title XI-Stamp Taxes—Schedule A—3 of the Revenue Act of 1918, the same Act as involved in both *Hellmich* v. *Hellman, supra,* and *Langstaff* v. *Lucas, supra,* a tax is imposed upon sales of stock. Here the Treasury Department has uniformly taken the position that no tax is payable where upon the liquidation of a corporation the certificates are surrendered for extinguishment.*

---

* See Treasury Decision 2752, Vol. 20, Treasury Decisions Under Internal Revenue Laws of the United States, Jan.-Dec., 1918, pp. 481, 482:

> "It [the tax] does not apply * * * to the surrender of stock certificates for retirement and redemption for cash. If, however, the corporation buys some of its own stock and transfers it to itself, whether or not it intends eventually to cancel it, the transfer to the corporation is subject to the tax. *The test is whether the immediate transaction results in the extinction of the stock or in vesting title to it in the corporation.*" [Italics added.]

See also S. M. 1257, Cum. Bull. Sales Tax Rulings, Dec., 1920, p. 104 construing the prior T. D. 2752:

> "The meaning in T. D. 2752 is held to be that the surrender of stock certificates for extinguishment, the stockholder receiving in return therefor the value of the stock, is not a transfer of stock, so is not taxable * * *."

We believe the Government cannot deny that they have not attempted to assert or enforce the payment of a stamp tax upon the surrender of stock in connection with the dissolution of a corporation. *Cf. Goodyear Tire and Rubber Co.* v. *United States,* 273 U. S. 100, showing that the real nature of the transaction governs rather than superficialities.

We submit, fourth, that if respondent's position is that a liquidation is in fact a sale or exchange, respondent's position goes far beyond the decisions of the Court of Claims below which specifically recognized that the liquidation was not in fact a "sale or exchange" (Record, p. 46) and far beyond the decision of the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31, 33, to be argued immediately following this case. Even the Treasury Department's own Regulations 45, Article 1548,* promulgated under the Revenue Act of 1918, involved in both *Hellmich* v. *Hellman, supra*, and *Langstaff* v. *Lucas, supra*, recognize that a distribution in liquidation of the assets and business of a corporation is a return to the stockholder of the value of his stock upon his surrender of his interest in the corporation. Moreover none of the elements of a sale or exchange were present according to the test recently laid down by respondent in *United States* v. *Fairbanks*, 95 F. (2d) 794 (Main Brief, p. 12).

We submit, fifth, that the test of the validity of respondent's contention that corporate liquidations are in effect a sale of the stock to the corporation is presented under the 1921 Act. Since for the first time under the 1921 Act the section comparable to section 101 used the phrase "sale or exchange" and since there was no provision comparable to section 115(c), a liquidation was required to stand upon its own merits as to whether it was or was not in fact a "sale or exchange". In *Gates* v. *Commissioner*, 9 B. T. A. 1133, we there find that the Commissioner took the position and the Board of Tax Appeals agreed that the gain upon a complete liquidation was not taxable as a capital gain

* The text of this Article has been reproduced in a footnote on page 25 of our Main Brief.

under the section comparable to 101. We submit that nothing in the decisions supports respondent's conclusion (Resp. Brief, p. 7) that corporate liquidations shall be treated "as what they in effect are—sales of stock to the corporations in liquidation" particularly when it is claimed that this is the meaning to be given "throughout the Revenue Acts and in section 101 (c)(2)."

Respondent's citation of and reliance upon *Childs* v. *Commissioner*, 35 B. T. A. 1125, adds little to its own argument. In the first place, the *Childs* case does not deal with the complete liquidation of a corporation at all, but with a profit realized as a result of a corporation's *redemption* of its preferred stock under an option reserved by the corporation.* It is at best, therefore, but an analogy. Even the reasoning of the case, we believe, cannot be considered as either authoritative or persuasive because the Board of Tax Appeals has twice reversed its position.** The preferred reasoning, it is submitted, is that found in *Rands* v. *Commissioner*, 34 B. T. A. 1107, at page 1116, where it is to be noted that the Board affirmed the Commissioner's contention that the gain was not subject to the provisions of section 101. The Board stated:

> "The gain derived from the redemption of the Motor Products debentures and preferred shares

---

* In *Robinson* v. *Commissioner*, 27 B. T. A. 1018, 1021, it was pointed out that the word "redemption", from the Latin words "re" and "emers", means to *repurchase*.

** *Childs* v. *Commissioner*, 35 B. T. A. 1125, 1126, expressly overruled the case of *Rands* v. *Commissioner*, 34 B. T. A. 1107, stating: "We applied the same rule to the gain derived from the redemption of both corporate debentures and preferred stock, holding that the gain should be treated as ordinary income." *Rands* v. *Commissioner*, 34 B. T. A. 1107, 1116, specifically followed the earlier case of *John H. Watson, Jr.* v. *Commissioner*, 27 B. T. A. 463, which expressly overruled *Henry P. Werner* v. *Commissioner*, 15 B. T. A. 482.

> was treated by the respondent in his determination of the deficiency as capital gain. He [Commissioner] now, *by affirmative pleading*, claims that the capital gain provision does not apply to the proceeds of redemption because the redemption of shares or debentures is *not a sale or exchange;* and that such proceeds are therefore properly to be taxed as ordinary income. This question has been fully considered in *John H. Watson, Jr.*, 27 B. T. A. 463, overruling *Henry P. Werner*, 15 B. T. A. 482, and followed in *Arthur E. Braun, Trustee*, 29 B. T. A. 1161, and *George A. Hellman*, 33 B. T. A. 901. We can see no distinction in principle, and the respondent's contention that the proceeds shall be treated as ordinary income is sustained." [Italics added.]

The position of the Commissioner in this case clearly indicates a lack of consistent administrative policy under the Act.

POINT II.

A. Sections 101 and 115 Are Mutually Exclusive.

Standing alone section 115(c) does not literally refer to section 101. Sections 115(c) and 101 are in different Supplements and Parts of the Act. Conversely, section 101 literally makes no reference to 115(c). Again respondent's argument must be one of confession and avoidance.

Respondent's argument by way of "avoidance" is, again, that there is a relationship which changes the literal meaning. Again we examine the nature of the asserted relationship. The reason given why appellants' construction is not correct, being too involved to paraphrase, is quoted:

> "* * * [Appellants' argument] is contrary to the entire scheme of the Revenue Act and makes the

> fundamental error of merging and confusing the separate and distinct questions of determination of amount of loss under section 111, recognition of loss under section 112, deductibility of loss under section 23, and the limitation on deductible losses, if they are capital losses, under section 101." (Resp. Brief, p. 17).

We submit, that if anyone is confusing the scheme of the statute it is respondent, as is shown by respondent's complete disregard of the fact that certain of the provisions are found in different Parts and Supplements of the Act—a part of the statutory scheme respondent is entirely silent about, as can be readily shown from respondent's own argument (Resp. Brief, pp. 16-18).

We agree with respondent that sections 11, 12 and 13 levy a tax on net income. It cannot be gainsaid that such sections are in Part I—Rates of Tax. We agree that section 12(c) contains a cross-reference to section 101. The cross-reference reads:

> "For *rate* and computation of tax in lieu of normal and surtax in case of net incomes * * *, see section 101." [Italics added.]

Now section 101 is found in Supplement A—Rates of Tax and is stated to be Supplementary to Subtitle B, Part I, which contains all of the sections 11, 12 and 13.

We agree with respondent that section 21 provides that net income means gross income computed under section 22 less the deductions allowed by section 23—all of which are in Part II—Computation of Net Income. We agree with respondent that section 22(d) in Part II provides that distributions by corporations shall be taxable to the shareholders as provided in section 115, which is in Supplement

B—Computation of Net Income, stated to be Supplementary to Subtitle B, Part II. We agree with respondent that section 115(c) provides that amounts distributed in liquidations shall be treated as the full payment in exchange for the stock and the gain or loss shall be determined under section 111 and recognized to the extent provided in section 112, all of which sections 111, 112 and 115 are found in Supplement B—Computation of Net income. So far we are in entire agreement as to the meaning and framework of the Act.

Respondent's analysis then continues that recognition of a loss is not a determination* that the loss is deductible. Here is the first disagreement as to the framework of the Act. The Committee on Ways and Means (Report, Committee on Ways and Means, No. 2, 70th Congress, 1st Session, p. 12) makes the statement directly relating to the framework of the 1928 Act that the general provisions are those which apply to the ordinary transactions of ordinary classes of taxpayers; that the general provisions are divided into Parts; and that the supplemental provisions are divided into Supplements. It is also stated that in the

---

* If respondent intended to make a play on the word *determination*, the sentence is very misleading. *Determination* in its technical sense is provided for in section 111. If respondent intended to paraphrase appellants' analysis, it is not a fair summary of appellants' statement (App. Brief, p. 6):

> "The amount of the loss to be recognized is provided for in section 112, wherein it is stated that the entire amount of the gain or loss determined under section 111 shall be recognized except as thereinafter provided in said section."

If respondent used *determination* as synonymous with *recognize*, the choice of terminology is inaccurate, as section 112 relates solely to recognition and section 115 states that after the amount is determined under section 111 it is recognized only to the extent provided for in section 112.

main the supplemental provisions apply only to extraordinary classes of taxpayers or only to extraordinary transactions of ordinary classes of taxpayers. A liquidation is an extraordinary transaction of an ordinary taxpayer having his net income computed under Part II of the General Provisions. Against these statements as to the intent of Congress, we submit that the use of the word *recognize*, both in sections 115 and 112, means what it says, to recognize—to allow. It is a confusion of thought to say that *recognize* means to *determine not to allow.*

Respondent's argument, therefore, that section 112 relates to the question of postponement of a loss until a later year is inaccurate and but half a truth. Section 112(a) states succinctly what is called the "General rule" that:

> "(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, *except as hereinafter provided in this section.*" [Italics added.]

The half truth is that admittedly if a case falls within the exceptions thereinafter provided in section 112, the gain or loss is not recognized—not allowed—but it is postponed. The fallacy in respondent's argument is therefore clear. If the case does not fall within any exception in section 112 the loss is recognized—allowed—not postponed. Respondent does not contend the instant cases fall within any exception.

On the other hand, respondent's position is that section 23 governs over the extraordinary provisions of 115—respondent stating (Resp. Brief, p. 18) that "the question whether the recognized loss is of a type which Congress

permits to be deducted is determined under section 23." So, on respondent's analysis, we have gone from the general provisions to the extraordinary provisions and now we come back to the general provisions. While as indicated above, we disagree that such a ring-around-the-rosy was ever intended, respondent gains nothing even on such an analysis with respect to the only important question—is 100% of the loss deductible in arriving at the Computation of Net Income under Part II and/or Supplement B. Either way, we submit our "net income" under 21 is arrived at by deducting 100% of the loss. Consequently, although we disagree with what we regard as a confused analysis we have found nothing so far which restricts our full loss.

Respondent's argument continues (Resp. Brief, p. 18) that "if the loss is within the type of loss permitted by section 23, *the question remains* whether it is a capital loss which may be deducted only to the extent and in the manner provided in section 101." We submit that finally respondent has arrived at the real question; the question which we discussed at the outset of our main brief in Point I A. So far respondent has said nothing which casts any doubt upon the fact that section 23 standing alone permits by its literal terms the full 100% deduction from loss on gross income in order to compute net income under section 21.

Respondent's analysis ends (Resp. Brief, p. 18) with an assertion unsupported by any reasoning that sections 23 and 101 are interdependent and with the mere citation of some of the defined terms in 101(c). This is evidently believed to end the matter—but just how is not stated. Our reply to the nature of the interrelation between sections 101 and 23 is set forth at pp. 1 to 5 hereof to which reference is

made. We submit that the true relationship approved by this Court in *Helvering* v. *Bliss, supra,* shows that nothing in section 101 limits deductibility in determining net income under Part II of the Act.

B. The Court Below Has Ignored the Second Sentence of Section 115(c).

Respondent does not advert to the omission by the court below to give effect to the second sentence of section 115(c) which provides how "such exchange" shall be treated but says nothing about section 101. The Respondent's Brief, pp. 16, 17-18, admits that section 115(c) provides that the gain or loss shall be *determined* under section 111 and *recognized* to the extent provided in section 112. At page 4 of Respondent's Brief by way of refutation, it is stated that "Losses upon corporate liquidations are not deductible, *as the taxpayers contend,* under sections 23(e) and 112, apart from sections 101 and 115(c)."

The respondent attributes to us an argument we have not made. We have never argued that sections 23(e) and 112 should be considered apart from sections 101 and 115(c). Such a grouping of the sections we believe to be entirely unjustified. Our position is that section 23(e) (and all other sections in Part II) as supplemented by all the sections in Supplement B (including particularly sections 111, 112, 113 and 115(c)), considered apart from section 101 (found in another Supplement A relating to Part I), recognizes—allows—the deductibility of the loss from net income under the Computations of Net Income sections.

Section 101 in Supplement A to Part I, considered apart, does not prohibit the deduction nor operate in a manner to make the 12½% limitation applicable.

C. Cross-Reference in Section 115(c) To Sections 111 and 112 Adequate.

The analysis contained in Respondent's Brief concedes the fact that section 115(c) refers to sections 111 and 112 (Resp. Brief, pp. 17-18). Nothing is said to show that the cross-reference is inadequate. No explanation for Congress' failure to make a cross-reference to section 101 is given. Respondent's argument resolves itself into the claim that despite an adequate cross-reference it was intended to make a liquidation a sale for all provisions throughout the Act including section 101. This flies in the face, we submit, of a definite reference that "such exchange" is governed by two sections—111 and 112. Respondent's construction is not a literal reading of the Act and no compelling reason or circumstances have been shown which should motivate the Court to expand the ordinary meaning of section 101.

D. Doubt To Be Resolved In Favor Of Petitioners.

Respondent does not deny the rule that, if the Act is even doubtful, the doubt is to be resolved in favor of the taxpayer. Respondent only contests the application of the rule. We submit that respondent's construction is at least doubtful.

E. Decision Below Leads To Absurd Consequences.

Respondent's answer to our argument that the decision below leads to absurd consequences is that the absurdity is due to Congress' failure to treat worthless securities as a sale or exchange rather than to the failure to treat corporate liquidations like worthless securities. True, there was a failure on the part of Congress to treat worthless securi-

ties like "sales or exchanges." But there was also a failure of Congress to treat liquidations like "sales or exchanges." Both "failures" arise from the fact that Congress intended that "sale or exchange" in section 101 should have only its ordinary and accepted meaning (*Burnet* v. *Harmel*, 287 U. S. 103). The respondent's argument is pure sophistry. The major hypothesis is wrong.

Respondent's attempt (Resp. Brief, p. 24) to show that equally illogical results will ensue from an application of the section as appellants construe it is entirely unsound. The burden of the absurdity which we claim is that the receipt of 1¢ per preferred share or a total of only $11 makes the tax $12,559.92 greater than if nothing at all had been received. We submit that respondent's illustration about one who has a gain of $100,000 is not responsive. Any gain is taxed at graduated rates. The more gain the higher the rate. On the literal construction of the sections for which we contend the receipt of 1¢ per preferred share on a loss transaction would make an increase in tax of only $2.53 over the tax computed if nothing were received, an amount commensurate with the additional income. We submit that to be responsive, respondent's illustration should result in a tax upon the receipt of an $11 gain greater than the tax upon the receipt of a much greater gain.

POINT III.

A. No References to Losses.

In answer to our argument that the Regulations contain no references to losses, respondent first states that the Commissioner relied on the fact that since the Regulations referred to gain, he ought to take it on himself to apply the same rule as to losses against the petitioners. We submit

that the Commissioner does not hold a mandate from Congress to bring about by administrative action a supposed symmetry and consistency in the extremely detailed and complicated provisions of the Revenue Act, which he thinks exist, but which somehow Congress failed to express and which he had failed to provide for in the Regulations.

An examination of respondent's citation of the cases (Resp. Brief, p. 11) will disclose that in each instance there was some administrative interpretation apropos of the question directly being considered. How such cases can have a bearing upon a situation where there is no administrative ruling apropos of the issue involved but only the Commissioner's inference from his own rationalization, we confess we cannot understand.

Moreover, the Commissioner has not always felt the same urge for consistency. In *Rands* v. *Commissioner*, 34 B. T. A. 1107, he interposed by affirmative pleading the claim that the capital gains provision did *not* apply to the proceeds of redemption of preferred shares and debentures because such transactions were *not sales or exchanges.*

In addition, respondent assumes its conclusion when it states that the Regulations "correctly" treats a corporate liquidation as a sale or exchange within section 101(c) of the Act. We submit that this assumption is contrary to the separate histories of both sections 101 and 115(c) (see *infra*, pp. 21 to 25) and Congressional disapproval has been indicated.

B. Congressional Disapproval of Regulations By Changes in 1928 Act.

To appellants' argument that Congressional disapproval of the Regulations was indicated by the changes made in the 1928 Act, respondent argues that the phrase "(as

hereinafter defined in this section)" which was added for the first time in the 1928 Act, upon a comparison of the whole section appears to be an addition, that is, "not one of substance but purely one of form." This is pure assertion. No authority is cited to sustain such proposition. There was no more reason for stating "as hereinafter defined" in the 1928 Act than there would have been for stating "as hereinbefore defined" in the 1926 Act as the defined terms were in a separate subsection.

We submit that it appears to be the most reasonable explanation that in adding the phrase, Congress was giving effect to the general framework of the Act, that is, emphasizing the substantive limitations of section 101. The substantive reason why the phrase was added is (as was found by this Court in *Helvering* v. *Bliss, supra*) that section 101 related only to a base for the imposition of a tax on a portion of net income and did not relate to the question of deductibility of losses in the determination of net income.

In any event, we had supposed that it ought to be generally conceded that it is more important to follow out literally what Congress has said than to defend a particular administrative act of the Commissioner taken upon his conclusion as to the necessity for making a similar application to losses of a rule he had earlier stated only covered gains.

POINT IV.

Respondent's Analysis of the Legislative History of Section 115 (c) and Section 101 Is Inaccurate.

Respondent claims, as do appellants, that the legislative history supports the construction contended for. We submit that respondent's analysis of the legislative histories of section 115 (c) and section 101 relies upon por-

tions of the history and ignores other portions to support what is essential to respondent's whole argument, and what is not apparent on the face of the Act—that section 115(c) has a general as opposed to a specific and limited purpose and operation.

Appellant submits that starting the historical treatment with the 1924 Act, when section 115(c) had already had at least six years of history, and section 101 more than two years of history, shows respondent's foresight but also reveals a weakness in respondent's history and logic. The salient fact is that each section has a historical origin related to a *specific* purpose. Moreover, the history is such that each provision came into the Act *separately* at a time when the other provision was not in the Act. We challenge refutation of the statement that the Revenue Act of 1918 was the first Act which contained a provision comparable to section 115 and that it did not contain any provision comparable to section 101; that the Revenue Act of 1921 contained the first provision comparable to section 101 and that it did not contain any provision comparable to section 115(c). It defies successful refutation that the early histories of these sections show a complete absence of any interrelation whatsoever.

Surprisingly enough the Government has heretofore in a case it now relies upon, *Echols* v. *Commissioner*, 61 F. (2d) 191, taken this very position—that there is no interrelation between 101 and 115(c), and that this is shown by the separate origins and histories of the two sections. It was there contended by the taxpayer that the section comparable to section 115(c) should be read in conjunction with and as enlarging the provisions of the section comparable to section 101, to which the Government in its Brief there replied:

"The petitioner's suggestion (Br. 17), that Section 201 (c) [Revenue Act of 1926 and comparable to section 115(c) of the 1928 Act] was passed for the purpose of permitting deductions of capital losses in cases like this is without support. In addition to the reasons already mentioned is the fact that Section 201(c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, was in substance the same, and *at that time there were no capital gains and losses provisions.*[5]

"Moreover, these latter provisions [comparable to section 101 of the 1928 Act] found their way into the law in order to stimulate *voluntary* capital transactions, found retarded when profits earned over a series of years were taxed as a lump sum at the regular rates in the year in which sale or exchange took place. House Report No. 350, 67th Cong., 1st Sess., pp. 10-11; Senate Report No. 275, 67th Cong., 1st Sess., pp. 12-13. Section 201 (c) [comparable to section 115(c) of the Revenue Act of 1928] *has no relation to the accomplishment of that purpose,* and in view of this alone it would seem that courts should be hesitant by extension of its provisions to bring within Section 208 (a) (2) [comparable to section 101 of the 1928 Act] transactions *not clearly there by the law as written and which the latter statute was not designed to cover.*" [Government's Brief, pp. 12-13. Italics added and matter in brackets added.]

---

[5] [Footnote from Government's Brief.]

"Moreover, Section 201 (c) of the 1921 Act, c. 136, 42 Stat. 227, made no special provision for liquidating dividends, *yet it was in that Act that the capital provisions first appeared.* Section 206 of the Revenue Act of 1921.

"The provision of the 1918 Act in respect of liquidating dividends was restored in Section 201 (c) of the 1924 and 1926 Acts [comparable to section 115(c) of the Revenue Act of 1928]."

After correctly urging upon the Court in the *Echols* case, *supra*, that the purpose and object of Congress' enactment of section 101 was not inclusive of the idea of liquidation under 115(c) but only to facilitate sales, and after pointing out that this was confirmed by the legislative history, can the respondent now seriously urge upon this Court a contrary position as to the purpose, objective and legislative histories?

It would seem that the Court should be hesitant by extension of section 115(c) to bring within section 101 transactions not clearly there by the law as written, and particularly transactions which the section was not designed to cover. We submit that the same history cannot now be made by respondent to serve a different purpose—one of giving 115(c) a general operation "throughout the Revenue Acts and in section 101(c)(2)."

The background and the earliest history of section 115(c) is, we believe, impartially treated in a separate part of our Main Brief, pages 24 to 28, and further elaboration would unduly extend the discussion. The conclusion therefrom is that historically section 115(c) served solely the special purpose of placing liquidating dividends in contradistinction to ordinary dividends out of current or accumulated earnings or profits. This distinction (except for a lapse between 1921 to 1924) has been perpetuated in every Revenue Act from the year 1918 to and including the Revenue Act of 1938. This original, special and long-established purpose marks the scope of section 115(c).

When the capital gains provisions first appeared in the Revenue Act of 1921 (c. 136, 42 Stat. 227). it was then regarded as settled law that a liquidation was not a sale. *Lynch* v. *Turrish*, 247 U. S. 221, 226, and *Lynch* v. *Hornby*,

247 U. S. 339, 341. Also, the word "sale" had a well-settled meaning.*

In adding section 101 to the statute, Congress, although defining many other terms, did not indicate therein any intent to depart from the well-established meaning of sale or exchange which even the court below though holding against petitioners held in its ordinary sense excluded liquidations (*Burnet* v. *Harmel, supra*).

Applying well-recognized principles of construction, Congress is presumed to have legislated with the settled principles applicable to sales and liquidations in mind (*United States* v. *Merriam,* 263 U. S. 179, 187) and must be presumed to have used the term "sale" in its usual, ordinary, and every-day meaning (*Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 561.)

Moreover, the purpose of Congress in enacting the provisions relating to gains arising from the sale of capital

---

* See *Williamson, et al.* v. *Berry,* 49 U. S. [8 Howard] 495, 543-544, where it was held that a "sale" is a word of special legal import both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold. A transfer for a consideration other than cash was not valid. In *Schutz* v. *Jordan,* 141 U. S. 213, 215, the Court aptly stated: "A party cannot be compelled to buy property which he does not wish to buy; and no trick of the vendor, conspiring with an agent of such party, by which possession is placed in him, creates on his part a contract of purchase." You cannot be forced into a "sale." In *Norfolk & West. Ry. Co.* v. *Sims,* 191 U. S. 441, 447, it was stated that a sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted, and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell and its acceptance. See also *Washington & Turner* v. *Ogden,* 66 U. S. [1 Black] 450, 456; *Preston* v. *Keene,* 39 U. S. [14 Peters] 133, 137; *Dahlinger* v. *Commissioner,* 51 F. (2d) 662, 663 (C. C. A. 3rd).

assets indicates that the construction for which appellant contends is correct. Prior to 1921 gains and profits representing the increased value of property were fixed as a lump sum in the year in which the property was sold and the gain realized. Thus, although this property represented the realization of a gradual appreciation of value extending over several years, the effect of the statute was to concentrate the gain and the tax in a single year. Consequently, the specter of a big surtax had the effect of inducing the owners of such property to withhold it from sale. The capital gains provisions were adopted to relieve this situation (H. R. 350, 67th Cong., 1st Sess., pp. 10-11). Congress was not trying to encourage corporate dissolutions. In view of the purpose of Congress, the statute should not be construed to cover transactions not within its purpose or within its meaning under the law at the time of its enactment.

It is a familiar rule of statutory construction that the terms used by Congress must be read in the light of, and in an endeavor to effectuate, the objects and purposes for which the statute was enacted, and that to this end the condition of affairs which led to the legislation may be considered, *American Tobacco Co.* v. *Werchmeister*, 207 U. S. 284, 293.

POINT V.

Reference to the Committee's Reports Is Inappropriate.

Respondent has introduced into the argument extended references to Committee Reports, particularly under the 1924 and 1934 Acts, discussing various provisions therein. Reference has even been made to changes inserted for the first time in the recent Revenue Act of 1938.

A. Committee Reports Under 1924 Bill.

Respondent claims (Resp. Brief, p. 12) that the Reports of the Senate Finance Committee and House Ways and Means Committee discussing section 201 (c) of the 1924 Act make it clear that corporate liquidations were to be treated as sales and exchanges of capital assets within section 203. Nothing *simpliciter* so states and nothing could be less clear.

Respondent refers first to the Senate Finance Reports although the Bill—a tax measure—originated in the House. The Report of this Committee stated that the existing law [1921 Act] had no provision in it similar to subdivision (c) of the Bill and proposed to restore a provision of the Revenue Act of 1918 (quoted in our Main Brief, pp. 24-25) with a further change reading:

> "There shall be taxed as a dividend to the distributee such an amount of the gain recognized under Section 203 as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The *remainder*, if any, of the gain recognized under Section 203 shall be taxed as a gain from the exchange of property." [House Draft of Bill.]

This addition was designed to give effect to the conclusive presumption that any distribution was out of earnings or profits (and therefore like a current dividend) to the extent thereof. To the extent earnings or profits entered into a liquidating distribution, it was proposed to let such earnings distribution be treated as an ordinary dividend subject only to the surtax. Dividends out of current earnings under both the 1918 and 1921 Acts were subject only to the surtax. After the "ordinary gain", the "remainder

gain", under the Bill, was to be taxed as the "entire gain" had been taxed under the 1918 Act—to wit, subject to both normal and surtaxes.

Read against these changes, it is obvious that the House Ways and Means Committee Report was concerned only with differentiating between current, periodic or ordinary dividends which would be subject only to the surtax and liquidating dividends which, as in the 1918 Act, were subject to both the normal and surtax. Therefore it was specifically stated in the Ways and Means Committee Report that the proposed Bill, *"as did the 1918 Act,"* treats liquidating dividends as in full payment in exchange for the stock like a sale. Treating liquidating dividends like a sale, as was done in the 1918 Act, was the only convenient analogy to differentiate them from ordinary dividends which were dealt with in the same section. No possible reference to the 12½% rate imposed in lieu of the normal and surtax was possible for this special rate was not imposed under the 1918 Act to which reference was made.

The House Bill, as it came to the Senate, had straddled on the question of the effect to be given to a liquidating dividend. As presented to the Senate Finance Committee, it was admitted that the Treasury regarded liquidating dividends the same as current, periodic or ordinary dividends and thus they were subject only to surtax rates. Neither the normal tax rates nor the 12½% rate in the section comparable to 101 imposed in lieu of both surtax and normal tax rates applied. The House had decided that the portion that was out of current earnings and profits ought to be subject only to the surtax and the part which was really a return on a person's capital should be treated as a return of the cost of his stock and when the cost was con-

sidered, any gain should be taxed at both surtax and normal tax rates. This the Senate Finance Committee and the Senate considered would lead to endless problems of administration so that it was decided, as stated in the Report, that if the Act was to be "easily administered" the distribution should have but one consequence instead of two and they decided to go back to the 1918 Act *in toto*. The Senate decided to remove from the Bill the matter quoted above. This gave the same effect of treating a liquidating dividend like a sale of the stock—that is, any profit was subject to both normal and surtaxes. This avoided the necessity of figuring out what portion of a liquidating dividend came out of accumulated earnings of the company. Everything that is said in the Committee Report is directed to contrasting the idea of "ordinary dividend" with a "liquidating dividend". It was realized that the former was a current gain, whereas the latter was a gain on a capital transaction.

In the case of capital transactions, the capital gain and loss provisions required first that the cost of the stockholder's investment be determined under a section comparable to section 113 of the Revenue Act of 1928; that the amount of the gain or loss be determined under a section comparable to section 111 and that the gain or loss be recognized in a section comparable to section 112. On the other hand, as non-capital income such as ordinary dividends was *ipso facto* a part of gross income under a section comparable to section 22 of the Revenue Act of 1928 no further provisions were necessary under the scheme of the statute.

All of the references respondent makes to the Committee Reports relate to gains. None relate to losses. This is

more than a happenstance, because a current dividend is always a gain and, therefore, in contrasting liquidating dividends (which in many cases resulted in losses) the convenient contrast was to a gain. This shows nothing as to what happens therefore in the case of losses.

Moreover respondent has quoted only from that portion of the Committee Reports which relates to section 201(c). A reading of all the matter quoted will disclose that not one mention is made of section 208. No reference has been made by respondent to the Committee Reports bearing upon section 208 of the Bill. An examination of these sections, however, will disclose that the discussion relative to section 208 makes no reference whatsoever to section 201(c). A reference to the case of *Piper* v. *Willcuts*, 64 F. (2d) 813, 815-816 (C. C. A. 8th) will disclose the clearly divergent views between the Senate and the House upon section 208. The discussion is devoid of any suggestion that liquidations were intended to be included within section 208.

We submit that there is nothing in these involved Congressional proceedings which "makes it clear", as respondent claims, that section 208 applies to liquidating dividends.

B. Section 23(k)(2) of Revenue Act of 1938.

The addition made in section 23(k)(2) of the 1938 Act is not indicative of anything concerning the provisions of section 23 or section 115(c), or section 101 of the Revenue Act of 1928, passed ten years earlier. A reference to section 23(k)(2) of the 1938 Act shows that it deals with bad debts and that the term "security" used in subdivision (2) is defined in subdivision (3) to exclude stock. Apparently the Government is confused as to the section of the 1938

Act which covers stock. The section covering stock is 23(g)(2) for the term "security" there used is defined in subdivision (3) to mean "stock".

C. Changes Made In 1934 And Later Acts In Relationship Of Former Section 101.

It will be observed upon a comparison of the provisions of the entire sections 23 and 101 of the Revenue Act of 1928 with sections 23 and 117 of the 1934 and later Acts:

(a) That unlike the 1928 Act, in the 1934 Act section 117 has been removed from Supplement A—Rates of Tax, stated to be supplementary to Subtitle B, Part I, and is now to be found in Supplement B—Computation of Net Income, Supplementary to Subtitle B, Part II.

(b) The reason for this undoubtedly is that in the 1934 Act, again unlike the Revenue Act of 1928, section 117 *no longer* is a section relating to the imposition of a tax in lieu of other taxes, but under the *revised* scheme of the Act relates solely to adjusting the concept "net income." That is why it has been shifted from one Supplement to another. The Revenue Act of 1934 for the first time removed the tax-imposing language theretofore found in both subdivisions (a) and (b) of section 101, which had stated:

"* * * there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title", etc.

Under the Revenue Act of 1938, and commencing with the Revenue Act of 1934, section 117, was removed to the Supplement bearing upon the Computation of Net Income, and now states:

"Percentage taken into consideration.—In the case of a taxpayer, other than a corporation, only

the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset *shall be taken into account in computing net income:* * * *" [Section 117(b) of the Revenue Act of 1938].

(c) Section 23 of the Revenue Act of 1928, if read in its entirety will be found to contain no cross-reference whatsoever to section 101, dealing with capital gains and found in an unrelated Supplement. On the contrary, section 23 of the Revenue Act of 1938, in view of the change discussed above, now makes specific cross-reference to section 117 because, under the revised and different scheme, section 117(a) now relates to the Computation of Net Income and not to the imposition of a tax thereon.

The subsequent history, it is submitted, rather than supporting the respondent's argument, if analyzed in its true light as explained above, supports and is entirely consistent with the appellants' position taken herein.

D. 1934 Amendment To Sections 115(c) and 117.

Respondent's references (Resp. Brief, pp. 14-15) to the provisions of the 1934 Act are inappropriate. Respondent quotes the amendment made to section 115(c) and has interpolated in brackets the statement that the section is *comparable* to section 101 of the former Acts, which statement is possibly intended to be qualified still further by Footnote 5 to the Brief. For the reasons explained above, section 117(a), while a *successor* to 101, since it relates to capital gains, is *not comparable* because it no longer relates to the imposition of a tax and has been transferred out of the Supplement relating to the imposition of tax, into the Supplement relating to the Computation of Net Income.

Naturally, since sections 115(c) and 117 are both in the same Supplement B, and both relate, since the Revenue Act of 1934, to the "Computation of Net Income" as opposed to the situation existing theretofore (when section 101 related to the imposition of a particular tax rate), in the drafting of the 1934 Act under the new scheme there adopted the addition of a sentence to make it clear that section 115(c) governed the treatment of liquidating dividends *despite* section 117(a) is entirely understandable and shows an intent to exclude in the application of that section, even in the 1934 Act, any consideration of the successor to section 101 of the 1928 Act. Also for the first time a new treatment was accorded gains or losses realized upon the retirement of obligations by virtue of the addition of subsection (f) to 117—the effect being that only a percentage of the gain or loss, depending upon the length of time held, was to be taken into account in computing net income.

E. Committee Reports Relating To 1934 Bill.

The respondent has quoted lengthy excerpts from the Committee Reports under the 1934 Revenue Bill containing self-serving declarations about the situation under the 1932 Act. In the final analysis a construction of the law is for the courts and not for the person preparing a résumé of the effect to be given to already enacted provisions. The fact is that the Report of the Senate Finance Committee quoted at length in the footnote on page 15 of Respondent's Brief is dated March 28, 1934. Appellants' claim for refund, raising the issue in this case as to the interpretation of the 1928 Act, was filed on December 15, 1932, and the same position had been taken in the return filed March 15, 1930.

The fact that an opportunity was taken in the 1934 Committee Reports to bolster the otherwise indefensible position of the Commissioner, who had decided to apply the 12½% capital tax rate to losses on liquidations as an administrative policy although the Regulations were silent upon the point is a confession of weakness. As eminent an authority as Professor Erwin N. Griswold, Professor of Law at Harvard Law School, and formerly Special Assistant to the Attorney General of the United States in charge of tax matters from 1929 to 1934, has summed up the practice of incorporating self-serving matter in Committee Reports on the tax bills as follows:

> "Statements of the latter sort, however, have recently been made in Committee Reports almost as a matter of course. As they are often in the nature of self-serving declarations it would not be surprising to find that the Courts may examine them with some skepticism." (48 Harvard Law Review 1032, 1035.)

We submit that it is a rule of construction well settled by this Court that changes made, as in the instant case, six or ten years later, in a subsequent Revenue Act, are inappropriate to the discussion. Such practice was disapproved by this Court in *Penn Mutual Life Insurance Company* v. *Lederer*, 252 U. S. 523, where Mr. Justice Brandeis in delivering the opinion of the Court upon a construction of the 1913 Act concluded (pp. 537-538):

> "In support of the company's contention that the interpolation of the words 'within the year' is necessary in order to support the construction given to the act by the Circuit Court of Appeals we are asked to consider the legislative history of the

> Revenue Act of 1918 (enacted February 24, 1919, c. 18, 40 Stat. 1057); and specifically to the fact that in the bill as introduced in and passed by the House, the corresponding section (233 (a)) contained the words 'within the taxable year' and that these words were stricken out by the Conference Committee (Report No. 1037, 65th Cong., 3d sess.) The legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction. *Caminetti* v. *United States*, 242 U. S. 470, 490. *But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question.* Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate." [Italics added.]

Since it is a fact of common knowledge that the Revenue Acts are changed almost from year to year, it is a considerable imposition upon taxpayers to have to defend against the imposition of what they consider unjust exactments by litigating the entire gamut of Revenue Acts after as well as before the particular statute applicable to a given case.

We have endeavored out of deference to the Government's contentions to show that there are good and sufficient explanations both for what has been said in the Committee Reports and for the various changes in succeeding Revenue Acts to which respondent has adverted and with respect to which Congress deemed it necessary to make changes from time to time. We believe, however, that such discussion is clearly inappropriate to the question for decision.

POINT VI.*

In Number 97 the Refund Claim Is Valid for the Full Amount.

The Government has raised in its answering brief the additional defense in No. 97, which the Court of Claims below did not find it necessary to consider, to the effect that any refund in excess of $127.64, with interest thereon, of the tax paid by the Estate of William A. White for 1929, is barred by the statute of limitations, section 322 of the Revenue Act of 1928.

Sections 321 and 322(a) provide:

> "SEC. 321. OVERPAYMENT OF INSTALLMENT.
>
> If the taxpayer has paid as an installment of the tax more than the amount *determined* to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount *determined* to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.
>
> "SEC. 322. REFUNDS AND CREDITS.
>
> (a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, *and any balance shall be refunded immediately to the taxpayer.*" [Italics added.]

---

* Respondent's brief, Point III, injects a new issue not considered in our main brief. See explanation in footnote, page 2 of main brief. As there stated petitioners submit this point upon the argument herein without oral argument.

Respondent has omitted to quote the first sentence of section 321 and left out (a) of 322 which is "Authorization." We urge first that "determine" is not restricted merely to the action of the Commissioner. "Determine" means also a definitive adjudication. If the Commissioner thought the correct tax liability was $2,783.47 but it is adjudicated to be $2,337.41, then his determination does not prevail over this Court's.

Next, section 322(a) is a direction that any overpayment (where no other taxes are due the Government) shall be immediately refunded. If it is determined by this Court that the loss on liquidation is fully deductible the correct tax liability is admittedly $2,337.41 and everything after receipt of such sum was immediately refundable.

Therefore, it appears that the Commissioner's action was correct in voluntarily paying back $757.64—it was not barred at December 31, 1931—at the time he made an "immediate refund to the taxpayer" under section 322 (a). The Commissioner was in error, however, in not refunding the further sum of $446.06 if it be determined by this Court that the loss on liquidation is fully deductible. To protect against the bar of the statute under section 322(b) upon the Commissioner's refusal to refund the further sum of $446.06, a claim for refund was made for the balance of the December 15, 1930 payment due if this Court's determination sustains petitioners' claim.

Blair v. *Birkenstock*, 271 U. S. 348, settled the manner of computing interest on overpayments where the original

payments had been made in installments. An analysis of the case follows:

BIRKENSTOCK CASE

Date	Return	Corrected	Refund Overpayment
Tax Year 1919:			
Tax Liability	$88,956.92	$53,890.07	
Payments 1920:			
3/15	$22,239.23	$22,239.23	
6/15	22,239.23	22,239.23	
9/27	22,239.23	9,423.61	$12,815.62*
12/15	22,239.23		22,239.23**
	$88,956.92	$53,902.07	$35,054.85
1923:			
5/18	Claim for refund	$35,054.85	
		$88,956.92	
1924:			
5/19	Refund made		35,054.85

The Court merely held that interest ran on $12,815.62 [*] from 9/27/20 and on $22,239.23 [**] from 12/15/20. The Court refused to follow the argument that interest should be computed on the excess of each quarterly payment from the several dates of payment. The *ratio decidendi* was that the overpayment of an installment is applied to the unpaid balance of tax due, as a payment on account; only when the full tax liability has been satisfied is there any overpayment to be refunded.

An analysis of the facts in No. 97 upon the same basis used in *Blair* v. *Birkenstock, supra,* will show that the full $446.06 may be validly refunded:

Date		Return	First Refund Corrected	First Refund Overpayment	Second Refund Corrected	Second Refund Overpayment
Tax Year 1929:						
Tax Liability		$3,541.11	$2,783.47		$2,337.41	
Payments 1930:						
3/15		$ 885.28	$ 885.28		$ 885.28	
6/14		885.28	885.28		885.28	
9/15		885.27	885.27		566.85	$ 318.42
12/15		885.28	127.64	$757.64		885.28
		$3,541.11	$2,783.47	$757.64	$2,337.41	$1,203.70
1931:						
12/31	Voluntarily Refund by Government			$757.64		757.64
						$ 446.06
1932:						
12/15	Claim for refund filed for					$ 446.06

A determination by this Court in petitioners' favor upon the substantive issue will result in a correct tax liability of $2,337.41. This will be a "determination" under section 321. The Commissioner's action on 12/31/31 was proper in refunding the $757.64 but erroneous in failing to refund an additional $446.06. Every sum in excess of $566.85 paid on 9/15/30 constituted an overpayment immediately refundable. When the $757.64 was refunded, nothing in section 322(b) limited the repayment and as to this the Commissioner performed his duty. Since an overpayment under section 322 is directed to be refunded immediately, the first refund is allocated against the first overpayment. So doing leaves a balance of $446.06 which the Commissioner erroneously refused to refund, for which a claim was duly and timely filed on 12/15/32, thus preventing the operation of any of the provisions in section 322(b).

We submit that the respondent's argument amounts to a contention that the Commissioner may *determine* the correct tax liability to the exclusion of the Courts as to any

voluntary repayment and that in so far as he makes a voluntary refund he can in effect deny to the taxpayer the right, to have, once he has fully paid his tax, an immediate refund of any overpayment as provided by the statute.

CONCLUSION

The decision below should be reversed.

In No. 97 the claim filed on December 15, 1932 is timely for the full amount of $446.06.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
JOHN W. FROST,
Attorneys for Plaintiff,
63 Wall Street,
New York, N. Y.

Dated: New York, N. Y., November 14, 1938.

BLANK PAGE